LIU, REN-SHUENN

v.

LEE, CHIU-PIN

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL SUIT NO: 22-54-94]
21 APRIL 1997

COMPANY LAW: *Shares - Sale of shares - Contract for sale of shares to non-member - Prohibition in articles of association against transfer of shares to non-members - Whether contract for sale of shares contrary to articles of association void - Whether transferee obtains equitable rights to shares notwithstanding failure to comply with articles - Hunter v. Hunter & Ors - Hawks v. McArthur*

CIVIL PROCEDURE: *Striking out - Issue raised solely a question of law - Whether case should go to trial - Whether appropriate for court to strike out pleadings where sole issue is one of law - Rules of the High Court 1980, O. 18 r. 19(1) & (2)*

The plaintiff purchased from the defendant some shares in the capital of one MC Industries Sdn Bhd ('the company'). The plaintiff paid the full price of the shares to the defendant and in turn, the defendant executed and delivered the relevant transfer forms together with the share certificate to the plaintiff. Subsequently, the plaintiff forwarded these documents to the company for the transfer of the shares to be registered. The company, however, refused to register the said transfer on the ground that the company's articles of association prohibited the transfer of shares to non-members unless first offered to members.

The plaintiff thereafter instituted an action against the defendant contending that the defendant refused to carry out the acts to vest ownership of the said shares unto the plaintiff. In his defence, the defendant asserted that he was not aware of the said clause in the company's articles of association. Therefore, he submitted, the sale of the shares was void *ab initio* and unenforceable not only by reason of the non-compliance with the company's articles of association but also because of his mistake of law and fact.

The plaintiff applied to strike out the defendant's defence and counterclaim pursuant to O. 18 r. 19 of the Rules of the High Court 1980 but his application was dismissed by the senior assistant registrar. Dissatisfied, he now appeals to judge-in-chambers. The plaintiff submitted that the defendant was a bare trustee and that no reasonable defence had been disclosed. The defendant, on

the other hand, contended that a reasonable defence had been disclosed. It was further asserted that the issue in this case, that is whether a contract for the sale of shares contrary to the articles of association is void, ought to be tried.

In the meantime, the entire issued share capital of the company was acquired by a public company in the name of Grand United Holding Bhd ('GUH'). As a result, the plaintiff applied for rectification of the register and he was registered as the owner of GUH shares allotted in exchange for the shares he had purchased. The defendant then obtained an injunction restraining the plaintiff from dealing with the GUH shares that the plaintiff held.

Held:

[1] A transferee having paid the full consideration for shares, obtains equitable rights to those shares notwithstanding a complete failure to comply with the company's articles of association in regard to the procedure to be followed before shares could be transferred.

[2] The agreement for the sale of shares is not void. The plaintiff and the defendant performed all they were contractually bound to perform. The defendant, upon receiving the full purchase price from the plaintiff and upon delivering the share certificate and the relevant transfer forms, was a bare trustee of the shares registered in his name. The alleged mistake of fact and law did not affect that relation.

[3] There was no impediment to the transfer of the shares, given the fact that the company had been restructured and that all shareholders had been issued shares instead in GUH that could be freely transferred, except that from the defendant. Further, the fact the register of members had been rectified is binding on the defendant.

[4] The company's articles of association could only account for the non-registration of the transfer but could not deny the beneficial ownership of the plaintiff. The plaintiff is entitled to a declaration of his beneficial ownership of the shares in GUH.

[5] The defence and counterclaim has not raised any issue which requires further serious consideration. This is a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence. The sole issue raised in this appeal, being entirely one of law, should be decided without the full rigmarole of a full trial.

[Appeal allowed; order accordingly.]

Cases referred to:
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 ***(cit)***
Cow v. Casey [1949] 1 KB 474 ***(aff)***
Gan Sin Tuan v. Chew Kian Kor [1958] 24 MLJ 62 ***(dist)***
Hawks v. McArthur [1951] 1 All ER 22 ***(foll)***
Hunter v. Hunter & Ors [1936] AC 222 ***(refd)***
Jaya Kumar v. Subramaniam Mohana Krishnan & Anor [1987] 2 MLJ 432 ***(refd)***
Loring v. Davis 32 Ch D 625 ***(foll)***
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246 ***(refd)***
New Straits Times (Malaysia) v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 ***(cit)***

Legislation referred to:
Companies Act 1965, s. 162
Rules of the High Court 1980, O. 14, O. 18 r. 19(1), (2)

Other source referred to:
Halsbury's Law of England, 3rd edn, vol 6, para 526
Halsbury's Law of England, 4th edn, vol 7(1), para 471
Palmer's Company Law, 24th edn
Pennington's Company Law, 7th edn, p 1005

For the plaintiff - Gerald Peter Samuel; M/s Peter Huang & Richard
For the defendants - Stella Lau; M/s Lim Kean Siew & Co

Reported by Farah Naim & S Dharmendran

JUDGMENT

Jeffrey Tan J:

This is the plaintiff's appeal (encl. 38) to judge-in-chambers against the decision of the learned Senior Assistant Registrar dismissing with costs his application (encl. 32) to strike out the defence & counterclaim under O. 18 r. 19 of the Rules of the High Court 1980.

The plaintiff applied to strike out the defence & counterclaim on grounds (a) to (d) under sub-r. (1). However, both counsel agreed, when this appeal was argued, to proceed on ground (a) but would argue grounds (b) to (d) if ground (a) would not dispose of the appeal.

Rule 19(2) mandates that "no evidence shall be admissible on an application under para. (1)(a)." As such, only pleadings will be considered for the purpose of determining whether the Defence & Counterclaim discloses a reasonable cause of action and defence (see *New Straits Times (Malaysia) v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor* [1985] 1 MLJ 226).

Briefly stated, the facts pleaded but not disputed may be summarised as follows. By a written agreement dated 16 December 1992, the defendant sold whilst the plaintiff purchased 351,500 ordinary shares of RM1 each in the capital of MC Industries Sdn. Bhd., a private limited company (company). The plaintiff paid the full price (NT$12,000,000) for the shares and the defendant executed and delivered a form of transfer of the said shares together with the share certificate (No 80) to the plaintiff. On 17 December 1992, the defendant notified the company of the sale and requested a new share certificate to be issued to the plaintiff. Later, the plaintiff forwarded the form of transfer and share certificate for registration to the company. The transfer was not registered. The secretary of the company informed the plaintiff, verbally, that the company had refused to approve the said transfer.

According to the statement of claim, the defendant refused thereafter to carry out the acts to vest ownership of the said shares unto the plaintiff. According to the defence & counterclaim, the Articles of Association of the company prohibited the transfer of shares to non-members unless first offered to members.

Article 34(A), as pleaded in the defence & counterclaim, reads as follows:

> No share shall be transferred to a person who is not a member unless it first be offered to all the other members.

The defendant pleaded that he was not aware of art. 34(A) and that the sale, because it contravened art. 34(A) and because of his mistake of law and fact, was *void ab initio* and unenforceable. The defendant pleaded furthermore (i) that the plaintiff instructed him, by telephone, when the company refused to register the transfer, to inform the company that the sale had been aborted, to avoid any investigation of the role of the plaintiff's brother, one Liu Jea Wang – a director of the company, who negotiated the sale between the plaintiff and defendant, together with the plaintiff – an allegation denied by the plaintiff, (ii) that he offered but the plaintiff refused a refund of the sale price, (iii) that he was aware, when he telephoned the company to convey the plaintiff's instructions to the company and was informed by secretary of the company, that the company had refused to approve the transfer by reason of art. 34 and as the company was undergoing a "restructuring programme" with Grand United Holding Bhd (GUH), a public company, and, (iv) that the plaintiff and Liu Jea Wang had knowledge of the "restructuring programme".

What was that "restructuring programme" was revealed in the submission of counsel. Mr Samuel for the plaintiff contended that the plaintiff had not received any official communication from the company, that GUH had acquired the entire issued share capital of the company, that the plaintiff applied, under

s. 162 of the Companies Act 1965, for rectification of the register, that the plaintiff was registered, on 29 March 1995, as the owner of those GUH shares allotted in exchange for the said 351,500 ordinary shares in the capital of the company, and that the defendant obtained an injunction, on 12 April 1996 in this proceedings but not by this court, restraining the plaintiff from dealing with those GUH shares. Miss Stella Lau for the defendant did not challenge those background facts.

Other background facts, gathered from the court file, are that, the plaintiff obtained judgment in default of appearance against the defendant on 19 July 1994, the judgment in default was set aside (not by this court) on 12 April 1996 and the setting aside order is the subject of appeal to the court above.

Mr Samuel submitted that the defendant was a bare trustee and that no reasonable defence had been disclosed. In connection with this submission, he tendered a bundle of authorities and more for the court's consideration.

Miss Stella Lau submitted, the long and the short of her submission, that a reasonable defence had been disclosed and that the issue – "whether a contract for the sale of shares contrary to the Articles is void" – ought to be tried. In that connection, she did not furnish any legal authority but she did put the issue, most succinctly, before the court.

Unquestionably, art. 34 was a restriction on the transfer of the said shares to the plaintiff unless the defendant had first offered the said shares to the members of the company.

A restriction in the articles of Thomas Hunter Ltd (T H Ltd) on the transfer of its shares was the subject of deliberation in *Hunter v. Hunter and Ors* [1936] AC 222. There, art. 17 provided that "No member shall be entitled to transfer any share otherwise than in accordance with the following provisions". The provisions required a notice to the company of the sale of shares, provided the mechanism for the determination of the sale price and gave a priority right to the other members to purchase those shares. Article 18 gave the directors power to refuse registration of any proposed transfer of shares.

The plaintiff – Samuel Hunter (SH), who was not on the board of T H Ltd, was a director and chairman of A. M Cawthra & Co. Ltd (C & Co. Ltd). As the account of C & Co. Ltd with their bankers was overdrawn, SH gave the bankers a continuing guarantee and deposited with them a certificate for 800 shares in T H Ltd. with a memorandum charging all shares and authorising the bankers, upon is default in paying the money secured, to sell the shares. Due to the pressure of the bankers for a transfer of the said shares to their nominees (nominees), SH deposited with the bankers a certificate for an additional 346 shares in T H Ltd. and executed instruments purporting to be

transfers of 1,146 shares in T H Ltd., and the nominees were registered as holders of the 1,146 shares and issued a new share certificate. Later, the bankers proceeded to sell the shares. The surviving nominee gave the required notice and Harry Hunter (HH), exercising his priority rights, purchased the said shares at the price determined by the articles. Meanwhile, HH transferred the said 1,146 shares and 850 additional shares after the bankers agreed, on the security of the 1,996 shares (amongst other securities) to finance HH's purchase of the 1,146 shares. Both transfers, to HH and to the nominees, were passed by the company and a new certificate was issued to the nominees. A few months later, two writs were issued. In the first writ, Emily Hunter (EH) claimed, as plaintiff on behalf of herself and all other shareholders of T H Ltd except HH, that the transfer of 1,146 shares by SH to the nominees, the transfer of 1,146 shares by the nominees to HH and the transfers of 1,146 and 850 shares by HH to the nominees were made in contravention of art. 17 and therefore null and void. By the second writ, SH claimed that his transfer of his 1,146 shares to the nominees, the transfer of 1,146 shares to HH and the transfer of 1,146 shares by HH to the nominees, being in contravention of art. 17, were null and void. Both writs sought the rectification of the register of members by restoring SH as the holder of 1,146 shares.

Bennett J who heard the first action and held that art. 17 prohibited a member from making any transfer except as were expressly authorised by the article and that a transfer of shares by way of security was not permitted gave judgment to EH and ordered the rectification of the register by restoring SH as holder of 1,146 shares.

Bennett J who also heard the second action (the action giving rise to the appeal to the House of Lords by HH and T H Ltd.) made one order in the action by SM and counterclaim by the bankers: declaring that SH had a subsisting right to redeem the 1,146 shares, his Lordship ordered SH to redeem the securities within a specified time and ordered foreclosure in default of SH's redemption of the securities.

Appeals against both judgments were heard together. The appeal in EH's action was dismissed. The appeal in SH's action was allowed: the Court of Appeal varied the judgment, *inter alia,* by incorporating a declaration that the sale of the 1,146 shares to HH operated as a sale of the equitable interest in the shares. From that decision, SH appealed to the House of Lords for the restoration of the order of Bennett J; HH, T H Ltd and the nominees cross-appealed against the declaration that the sale to HH operated as a sale of the equitable interest in the shares.

In the event, allowing the appeal but dismissing the cross-appeal, the House of Lords restored the order of Bennett J. Pertinent to this appeal, the House of Lords held, ostensibly as binding authority, that art. 17 was not observed and that the sale by the bankers did not operate to pass the equitable apart from the legal interest to HH. That impression, however, on closer study of their Lordships' opinions, is far from true.

The two broad questions raised by the appeal, according to Lord Blaneburgh, were whether there was still operative and unsatisfied a demand upon SH to pay the bankers the debt secured by the memorandum of charge (see p. 249) and whether SH as mortgagor was bound by the sale to HH of the equitable interest in SH's mortgaged shares (see p. 253).

On the first question, the Lord Chancellor, with him Lord Blaneburgh, Lord Russell of Killowen and Lord Macmillan, held that the bankers had no right to sell the shares to HH as there was no effective demand for payment before the attempted sale.

Having so decided, Viscount Hailsham said, with the total concurrence of Lord Macmillan, at pp. 247 to 248:

> This is sufficient to dispose of the case, and any observations on other points can have no binding authority.

On the second question, Viscount Hailsham discussed the effect of art. 17 in the following terms (at p. 248):

> I am satisfied ... that the steps taken to put the nominees of the Bank on the register were not in accordance with the terms of the article. This construction does not prevent a mortgage of the shares or their sale by the mortgagee in default of payment of the mortgage debt. But the sale must be effected in accordance with the terms of the article. The Bank could have taken from the plaintiff letters addressed to the auditors and to the secretary in blank, or they could have taken a power of attorney from the plaintiff to write such letters in his name and on his behalf. I do not think that the disregard of Article 17 rendered the transaction *ultra vires* the Company, or that it could not have been regularized by the assent of the shareholders; but that assent was never obtained.

Other than Lord Atkin who entertained doubts on the question of no effective demand, the other law Lords, Lord Russell in particular, focused their learned opinions, primarily, on the question of the demand.

Indeed, on the second question, Lord Russell pronounced, having said that he did not "feel convinced that the entry on the register of persons who are transferees under a transfer not authorised by art. 17 is necessarily a nullity", that "it is unnecessary to express any decided opinion upon these points" (see p. 264).

Lord Blaneburgh addressed the second question from the standpoint of the memorandum of charge, of the order in EH's action which was binding, in the opinion of his Lordship, on the parties to it, who included HH and the nominees, of the price and of the close relationship between the bankers and HH. His Lordship expended all comment on art. 17 in the following terms (see p. 255):

> Bennett J. in his judgment in the present case, referring to that decree in Emily's action which a week before he had made, accurately described, I think, its effect upon the rights of the parties on the present question. 'I have to decide the rights of the parties' he said, 'upon the footing that the articles of association [of the Hunter Company] did not permit the transfer by the plaintiff of his shares to the Bank's nominees Messrs Lyford and Ragg; nor the registration of them as shareholders, nor any of the subsequent dealings by them with the shares.' The decree and the rectification of the Hunter Company's register of members thereby directed brought with it, that is to say, no less a result than that the sale of the shares by the Bank's nominees to Harry was, under the articles, invalid and inoperative. And this is also the basis of the order of the Court of Appeal. It was for this reason that the Court of Appeal substituted another sale for the sale which had failed, with this consequence, that the only sale of the shares ever deliberately intended and made by the Bank – a sale under the articles – has as a result of the decree in Emily's action disappeared, and that there has been substituted for it, as a disposition binding the appellant, a sale of the equitable interest in the shares outside the articles altogether.

Finally, Lord Atkin dictated his learned opinion of art. 17 in the following terms:

> I found my own decision, however, on the grounds stated by the Lord Chancellor on the second point. The effect of art. 17 in my opinion is to provide the means and the only means by which a member of the company can form an agreement for the sale of shares, which can only be constituted by the act of the secretary as agent for seller and purchaser declaring a contract to be concluded at the price fixed by the auditor. That was not done in this case, and in my opinion no rights arose between the Bank and Harry Hunter under any contract of sale either equitable or legal.

The conclusion from the analysis of *Hunter v. Hunter* is this. Their Lordships had disposed of the appeal on the issue of no effective demand. Lord Hailsham and Lord MacMillan specifically said it was so. Their Lordships even advised that "any observations on other points can have no binding authority". Lord Russell voiced that he did not "feel convinced that the entry on the register of persons who are transferees under a transfer not authorised by art. 17 is necessarily a nullity" and that it was unnecessary to express any decided opinion on the issue relating to art. 17. Lord Blaneburgh addressed the appeal

from other standpoints, even though, he did say, by way of approval of the judgment of Bennett J, that art. 17 did not permit the transfer by SH of his shares to the nominees nor the registration of the nominees as shareholders nor any of the subsequent dealings of those shares. Only Lord Atkin voiced a decided opinion that no rights, either equitable or legal, arose between Harry Hunter and the Bank.

On the second question in *Hunter v. Hunter,* tallying the score, there was a hung decision. Not surprisingly, therefore, since the House of Lords had not decided the issue, most legal bibliotheca pass over *Hunter v. Hunter,* even though of the House of Lords, as authority that a sale of shares in breach of the articles of a company would not pass any equitable or legal rights.

Halsbury's Law of England 3rd Edn Vol 6 para 526 states the position in law as follows:

> A restriction on the right to transfer shares is not repugnant to the absolute ownership of the shares, but is one of the original incidents of the shares attached to them by the contract contained in the articles. Any condition precedent to transfer, such as obtaining the consent of the directors, must be observed ... There is apparently no limit to the restriction on transfer which may be so imposed, although restrictive provisions are strictly construed because shares, being personal property, are *prima facie* transferable. A transfer for full consideration made in defiance of binding restrictive provisions will suffice to pass the equitable as distinct from the legal interest in the shares therein comprised.

Halsbury's Law of England 4th Edn Vol 7(1) para 471 (the addendum to the 3rd edition is printed herein in italics) states the position in law as follows:

> A restriction on the right to transfer shares is not repugnant to the absolute ownership of the shares, but is one of the original incidents of the shares attached to them by the contract contained in the articles. Any condition precedent to transfer, such as obtaining the consent of the directors, must be observed ... There is apparently no limit to the restriction on transfer which may be so imposed, although restrictive provisions are strictly construed because shares, being personal property, are *prima facie* transferable. *Nevertheless if the intent and existence of the restrictions are sufficiently certain, they will not be rejected as being unworkable if a term can be implied which will give them business efficacy. Articles restricting the transfer of a share are construed as restricting only a transfer of the legal title, and not as preventing the transfer of the beneficial interests therein.*
>
> *Accordingly,* a transfer for full consideration made in defiance of binding restrictive provisions will suffice to pass the equitable as distinct from the legal interest in the shares, *although the transferor is entitled to annul the transaction if registration cannot be effected within a reasonable time.*

The commentary in *Pennington's Company Law* 7th Edn p. 1005 on the rights of a purchaser of shares subject to the pre-emptive rights of other members reads as follows:

> ... until one or more of the other members have accepted the intending seller's or transferor's offer in exercise of their preemptive rights, the transferor holds the shares as a trustee for any person to whom he has agreed to sell or transfer them, and like any other beneficiary, the purchaser or intended transferee is entitled to have all financial benefits in respect of the shares passed to him, and when he has paid the purchase price, he may also direct how the voting rights attached to the shares shall be exercised.

In the footnotes to p. 1005, the learned Professor of Law left little doubt as to how he perceived *Hunter v. Hunter:*

> In *Lyle and Scott Ltd v. Scott's Trustees* [1958] SC at 243, Lord Clyde in the First Division of the Court of Session held that no equitable title passed to the outside purchaser until the seller or transferor had offered his shares to the other members and they had declined to buy them, but this point was left undecided by the House of Lords. In *Hunter v. Hunter* [1936] AC 222 at 261, Lord Atkin expressed the same view, but it was not necessary for his decision and the other law lords did not concur in his opinion.

Palmer's Company Law 24th Edn was not even deferential. *Hunter v. Hunter* was left out altogether in its commentary on the equitable rights of transferees pending registration (40-09) and was received, at 40-18, as authority that "restrictions on the right of a transfer may restrict a mortgagee's power of sale over the shares since he can have no right of transfer that is forbidden to members."

Instead, the learned authors of *Halsbury's Laws of England*, *Pennington's Company Law* and *Palmer's Company Law* as one referred to *Hawks v. McArthur* [1951] 1 All ER 22 as the authority that a transferee having paid the full consideration for the shares had obtained equitable rights therein, notwithstanding the complete failure to comply with the company's articles to be followed before shares could be transferred.

In *Hawks v. McArthur*, the plaintiff (Hawks) was the holder of a charging order affecting the 1st defendant's (McArthur) 500 ordinary shares in the capital of W. Lucas & Sons Ltd. Hawks claimed a legal and beneficial interest to those 500 shares. The 2nd and 3rd defendants claimed that the beneficial interest in those shares had passed to them as a result of transfers executed in their favour by McArthur and that McArthur had no interest in the shares at the date of the charging order on which the charge could operate. By art. 12, no shares should be transferred until all pre-emptive rights had been exhausted. On 16 September, McArthur executed a transfer of 200 shares in

favour of the 2nd defendant. On 21 September McArthur executed a transfer of 300 shares in favour of the 3rd defendant. Article 12 was not complied. The 2nd and 3rd defendants paid McArthur the full consideration for the shares, but the shares were still registered in the name of McArthur. On 4 October Hawks recovered judgment against McArthur, was granted leave to proceed under the judgment and obtained a charging order nisi on the shares in McArthur's name.

Vaisey J held that the 2nd and 3rd defendants having paid the full consideration for the shares had obtained equitable rights to those shares, notwithstanding the complete failure to comply with the company's articles in regard to the procedure to be followed before shares could be transferred, and that the 2nd and 3rd defendants' rights, acquired earlier than the equitable right of Hawks, prevailed over the claim of Hawks.

Of interest is the learned judge's observation and distinction (see p. 27) of *Hunter v. Hunter.*

> I have, of course, endeavoured to accept the guidance afforded to me by that case, as it is my duty to do so, but the facts there were not the same as in this case, and I think that the basic difference is that in *Hunter v. Hunter*, the sale was by a mortgagee. That essential difference is emphasised in *Re Hafner* [1943] IR 426; 2nd Digest Supp, in which Black J in the court of first instance in Ireland, considered that the fact that *Hunter v. Hunter* was dealing with a sale by a mortgagee was of the first importance, and that the case must be read with that characteristic in mind.

Further down the same page, commenting on Lord Atkin's statement that art. 17 was the only procedure for the sale of shares and that no rights either equitable or legal arose between HH and the bankers because art. 17 was not complied, the learned judge remarked:

> I find the greatest difficulty in seeing how I ought to apply the decision in *Hunter v. Hunter* to the facts of this case. On general principles, in such circumstances as those of the present case, where a man who has an interest in shares in a company receives something for the sale of those shares and executes under seal a transfer of those shares for that purpose, I cannot bring myself to suppose that *Hunter v. Hunter* constrains me to hold that everything done in that transaction is a complete nullity.

Hunter v. Hunter was also considered in *Gan Sin Tuan v. Chew Kian Kor* [1958] 24 MLJ 62. In the latter case, the appellant and respondent entered into an agreement whereby the appellant agreed to sell to the respondent his 2,340 shares in The United Tractor Company, a private limited company whose articles restricted the transfer of its shares. Both parties knew of the restrictions. The respondent duly paid the purchase money and the appellant

handed the share certificate to the respondent. Later, the appellant refused to execute a transfer of the shares. The respondent demanded for the transfer of the shares. The appellant replied that the agreement was contrary to the articles of the company and that he could not transfer the shares but would return the purchase price. The respondent refused to accept a refund and brought an action for specific performance or alternatively a declaration that the appellant was a trustee of the shares or alternatively damages for breach of agreement.

Following *Hawks v. McArthur*, Rigby J held that by the contract of sale and receipt of payment of the purchase price, the equitable and beneficial interest in the shares passed from the appellant to the respondent. On appeal, the Court of Appeal held (Whyatt CJ (S) and Hill J, Thomson CJ dissenting) that the agreement made contrary to the articles was void and that no rights, legal or equitable, arose between the appellant and the respondent.

Nonetheless, contrary to what would be the normal natural assumption, the Court of Appeal had not rejected nor disproved *Hawks v. McArthur*. That is evident from the majority judgment as well as minority judgment of Thompson CJ.

Whyatt CJ (S) distinguished *Hawks v. McArthur*, at p. 73:

> It remains to consider whether this principle which fits the facts of *Hawks v. McArthur* also fits the facts of the present case. It is true that the plaintiff paid the defendant the full amount of the purchase price, as did the purchasers in *Hawks v. McArthur*, but unlike the vendors in that case, the defendant did not, either at the time he received the purchase money, or at any other time, execute an instrument of transfer ... on the contrary, he consistently and repeatedly refused to take any steps to execute a transfer of the shares to the plaintiff. This, in my opinion, is a vital distinction between *Hawks v. McArthur* and the present case. In the former case it could be inferred, without relying on any previous contract, since McArthur had executed instruments of transfers which *ex facie* effected a sale in favour of the intended transferees; but in the present case, there is no similar instrument and therefore no such inference can arise.

And Hill J held that the plaintiff was not entitled to damages or to have the contract enforced "as both parties freely entered into the contract knowing the terms of the articles". (see p. 75).

As for the minority judgment, Thompson CJ readily admitted that he was "basing (himself) on *Hawks v. McArthur*". His Lordship concluded, at p. 69, that "in so far as the case of *Hunter v. Hunter* is authority for anything in connection with the sale of shares in a private company of the description, it is authority for the proposition that while legal rights can only be transferred in accordance with the restrictions contained in the articles, these restrictions do not affect the transfer of equitable rights."

It is also evident, even though less conspicuous, that the majority judgment in *Gan Sin Tuan* did not entirely follow *Hunter v. Hunter*. Whyatt CJ (S) observed that art. 20 did not apply to the sale of equitable interest in the shares of the company and that no difficulty would have arisen if the agreement had been an agreement to sell only the equitable interest. (See p. 71). Accordingly, consistent with his observation, Whyatt CJ (S) would not pronounce void an agreement for the sale of equitable interest, if the articles do not restrict the sale of equitable interest in the shares of a company, whereas Lord Atkin, consistent with his statement, would pronounce void an agreement for the sale of equitable interest "if the means by which a member of the company can form an agreement for the shares of shares" were not employed, meaning, even if the articles do not restrict the sale of the equitable interest in the shares of a company. Evidently, Whyatt CJ (S) had not subscribed altogether to the view of Lord Atkin. According to Whyatt CJ (S), an agreement for the sale of equitable interest in shares, if the articles do not restrict the sale of equitable interest, is not void (see p. 71) and where the "transferor executed a transfer of the shares and the intended transferee paid the purchase money to the transferor, it follows, therefore, on the principle so clearly expressed by Mr Justice Chitty in *Loring v. Davis* 32 Ch D 625 that the transferees thereupon became the equitable owners of the shares": per Whyatt CJ (S) at p. 73.

In the instant case, both parties executed an agreement for the sale of 351,500 ordinary shares of RM1 each in the capital of MC Industries Sdn. Bhd., the plaintiff paid the full price (NT$12,000,000) whilst the defendant executed and delivered a Form of Transfer together with the share certificate (No 80) to the plaintiff. Unquestionably, it is on all fours with *Hawks v. McArthur*. The distinction drawn by Whyatt CJ (S) in *Gan Sin Tuan,* is not present. Furthermore, the plaintiff did not enter into the agreement with knowledge of art. 34 as would disentitle the plaintiff, going by the ratio of Hill J, from having the agreement enforced. And as in *Gan Sin Tuan,* the defendant offered a refund that the plaintiff refused. The instant case is *Gan Sin Tuan* without the distinction drawn by Whyatt CJ (S). The hypothetical case postulated by Justice Chitty in *Loring v. Davis (supra)* that Whyatt CJ (S) approved (see p. 73) as giving rise to a relation of trustee and *cestui que* fits the facts of the instant case.

The agreement, answering the only issue before the court, is not void. The plaintiff and the defendant performed all that they were contractually bound to perform. The defendant, upon his receipt of the full purchase price from the plaintiff, upon his delivery of share certificate No. 80 and the Form of Transfer to the plaintiff, was a bare trustee of the shares registered in his name. The alleged mistake of fact and law did not affect that relation. Any prior knowledge of the restructuring scheme had not vitiated the sale. There was

no impediment to the transfer of the shares, given the fact that the company had been restructured and that all shareholders had been issued shares instead in a public company that could be freely transferred, except that from the defendant. Indeed, the defence is totally unsustainable, given the further fact that the register of members had been rectified, by an order that is binding, surely, since it was not contended otherwise, on the defendant. At best, art. 34 could only account for the non-registration of the transfer but could not deny the beneficial ownership of the plaintiff. Quite obviously, the plaintiff is entitled to a declaration of his beneficial ownership of the shares in the public company.

"The issue should be tried", Miss Stella Lau entreated. She meant to say to let it go to trial. Except, with respect, Miss Lau forgot that the sole issue raised is one of law.

In *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 1 CLJ 246; [1987] 2 MLJ 183, an appeal against the order of the judge under O. 14 of the Rules of the High Court 1980, the former Supreme Court per Hashim Yeop Sani SCJ (as he then was) held:

> ... where the issue raised is solely a question of law and simple without reference to any facts or where the facts are clear and undisputed the court should exercise its duty under Order 14 as in any other cases and decide on the question of law. This is even so if the issue of law is a difficult one. If the court after considering the argument is satisfied that it is really unarguable then the court should grant summary judgment.

In *Jaya Kumar v. Subramaniam Mohana Krishnan & Anor* [1987] 2 MLJ 432, where the only defence that merited serious consideration was one of law, Thean J (as he then was) reasoned out as follows:

> This, it is submitted, is a triable issue and the case should therefore go to trial. I agree that this is an issue, but on reflection, I think such an issue can and should be disposed of now and I should not let it go to trial where the same point would be re-argued ... It has been repeatedly held by the Court of Appeal in England that on an application under O. 14 where the issue raised is one of law and it is clear-cut and can be decided upon, then the judge hearing it, or, upon an appeal, the Court of Appeal, should decide on it rather than let it go to trial. In *Verrall v. Great Yarmouth Borough Council* [1981] QB 202, 218, Roskill LJ (as he then was) said:
>
> > We have often said in this court in recent years that where there is a clear – cut issue raised in Order 14 proceedings, there is no reason why the judge in Chambers – or, for that matter, this court – should not deal with the whole matter at once. Merely to order a trial so that the matters can be re-argued in open court is to encourage the law's delays which in this court we are always trying to prevent.

Similar observations were made by Robert Goff LJ (as he then was) in *European Asian Bank A.G. v. Punjab & Sind Bank (No. 2)* [1983] 1 WLR 642, 654:

> Moreover, at least since *Cow v. Casey* [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under Order 14, even if the question of law is at first blush of some complexity and therefore takes a little longer to understand. It may offend against the whole purpose of Order 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go to trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal; see *Verrall v. Great Yarmouth Borough Council* [1981] QB 202, 215, 218, per Lord Denning MR and Roskill LJ. The policy of Order 14 is to prevent delay in cases where there is no defence; and this policy is, if anything, reinforced in a case such as the present, concerned as it is with a claim by a negotiating bank under a letter of credit: compare *Bank fur Gemeinwirschaft Aktiengesellschaft v. City of London Garages Ltd* [1971] 1 WLR 149, 158 per Cairns LJ, a case concerned with a claim on a bill of exchange by a holder in due course.

And that principle has general application. As Lord Green MR said, in *Cow v. Casey (supra)* at 481, "the court has precisely the same duty under O. 14 as it has in any other case."

The Defence & Counterclaim (the latter is wholly dependent on the defence) has not raised any issue which requires further serious consideration. This is a plain and obvious case for striking out the pleadings as disclosing no reasonable cause of action and defence (see *Bandar Builder Sdn. Bhd. & Ors v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7; [1993] 3 MLJ 36). The sole issue raised in this appeal, entirely one of law, should be decided without the rigmarole of a full trial.

In the premises, allowing the appeal, the Defence & Counterclaim is struck out and judgment as prayed in encl. 32 is entered accordingly. In the result, in addition, the injunction of 12 April 1996 is dissolved.

Miss Lau applied for a stay of the order dissolving the injunction, to enable her to take instructions from the defendant. A large sum is involved, she said, and the plaintiff might put himself, since both parties are foreigners, beyond the jurisdiction of the court. At any rate, she recognised, to her credit, "that the defendant had received NT$12,000,000 and it would not be right if the plaintiff could not even recover his capital". To swing the court, she suggested a sale of GUH shares, saying it would have her consent, to the value of RM2,000,000. Mr Samuel objected to a stay but conceded that the suggested

sale of GUH shares would not "hurt" the plaintiff. Since that would be the case and a stay upon the terms that Miss Lau suggested would not be iniquitous, the order dissolving the injunction is stayed until the expiration of the period for appeal, or until, in the event of an appeal, the disposal of the appeal against the judgment of this court, but with leave however to the plaintiff to sell the said GUH shares to the value of RM2,000,000.